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Docket No. _____

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In the
SUPREME COURT of the UNITED STATES

October Term 1993

ROBERT SCOTT DUNNING,
Petitioner-Appellant
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT
in
Case Number 92-1101

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August 21, 1993

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I

Questions Presented

The case which taxpayer petitions for re-exanination involves the IRS disallowance of business deductions for an artist in the early years of his business under Secion 183 of the tax code. Taxpayer argues that the IRS improperly and arbitrarily classified the business as a hobby when it was actually a serious business and professional activity. This petition is respectfully submitted to the Supreme Court to raise the following issues:

1. A Constitutional question is raised in this case with respect to Article I., Section 8. as to whether the Executive in the person of the IRS has the right to dictate in detail the disposition that an artist makes of his product, immediately

after its creation, contrary to the provisions of Section 8, paragraph 8. which, requires Congress...

"...To promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;..."

a provision of the Constitution which grants immediate control to the artist himself. Further, the question is raised as to whether granting such broad discretion to the IRS is a usuration of an authority expressly granted to the Congress under this same Article.

2. Does absolute proof that the IRS is willing to lie to the Tax Court, and in fact has committed perjury in the case to cover up a lack of due diligence, shift the burden of proof from the taxpayer to the IRS or are the findings of the IRS to

be considered "presumptively correct" even after such proof of dishonesty has been made and confessed by the IRS in the form of an apology to the court?

3. Does Section 183 of the tax code allow the IRS to capriciously set a different standard of compliance between different taxpayers and also a more lenient standard of compliance for the IRS than it sets for specially singled out taxpayers contrary to ARTICLE I, Section 8 of the Constitution of the United States?

4. A question is also raised under ARTICLE II, Section 3. as to whether agencies of the Executive Branch are required to take due care in executing the major provisions of the tax laws they administer by mandate.

5. An important issue is raised as to whether a court is required, absent any extraordinary circumstance, to base its rulings on the case that is actually presented to the court as original testimony by the litigants, particularly when one of the litigants is a federal agency, or whether, absent such circumstances, the court is empowered to substitute a case of its own invention and then to rule on the substituted case.

6. A question is raised with regard to orderly proceeding in court cases. The question raised here is whether a court judgment can do service for a required administrative judgment of an agency of the Executive Branch when the executive agency has failed to bring a proper case under given legislation by willfully failing to observe the precepts of that same legislation.

7. A Constitutional question is raised under Article V of the Bill of Rights which requires due process of law before property can be taken from any citizen for public use. The question here is: Does mere accusation by the IRS without compliance with Congressionally mandated procedures constitute due process?

8. A question is raised under Article XIV, Section 1. as to whether the ruling of the Tax Court in this case sets up a double standard for the deductability of travel expenses for professional activities, granting it capriciously to some professions but not to others. If allowed to stand this ruling will have a wide-ranging social impact. The question is raised as to whether such a standard, imposed solely for the administrative convenience of the IRS and clearly never

the intent of any Congressional legislation, constitutes a denial of equal protection under the law.

9. Also under Article XIV, Section 1., the ruling of the lower courts presents a question of whether the IRS is allowed under law to discriminate against a particular profession, artists in the particular example, but not by its nature limited to that one profession. The implications extend beyond this particular case. However, ARTICLE XIV, Section 1., states in part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

As a result of the precedent of discrimination against art and artists that the ruling here appealed establishes; all artists in the United States will be placed at a particular disadvantage with respect to the Tax Code. The Supreme Court will doubtless wish to give thoughtful consideration to a decision that effectively relegates over 90% of the professional graphic artists in the United States to "hobbiest" status and deprives them, contrary to the intent of Congress, of the tax advantages readily accorded other, similar, business and professional activities.

10. The question of thoroughness in the court system is raised. Specifically, can any court system maintain public respect if it blandly ignores the uncontested facts of a case, makes numerous factual errors of substance; bases its fundamental

decisional processes on the personal biases of the judges; and ignores compelling evidence of perjury?

11. A question is raised as to the level of scrutiny required of federal agencies and courts in cases where a presumption of correctness is imposed. Can a perception of unimportance of a case on the part of the government and the courts, as evidenced by demonstrable deficiencies of care in the preparation and judgement of a case, be supported in view of the disadvantaged position of the taxpayer with respect to the burden of proof. Additionally, can a taxpayer be held responsible for omissions of proof or failure to prove issues not raised or questioned at the time of trial when simultaneously subjected to both the burden of proof and a court imposed time limit.

II

Parties to the Proceeding

The formal parties to this proceeding include:

ROBERT SCOTT DUNNING,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

III

Table of Contents

I. Questions Presented..... i.

II. Parties to the Dispute..... 9i.

III. Table of Contents..... 10i.

IV. Reference to Reports..... 11i.

V. Grounds Invoked..... 11i.

VI. Constitutional Provisions..... 13i.

VII. Concise Statement of the Case. 1.

VIII. Importance of the Case..... 27.

IX. Appendix A: Opinions and Orders

X. Appendix B: Applicable Federal Law

IV

Reference to Reports

No unofficial documents relating to this case have been made public although the IRS doubtless has many such documents. A Freedom of Information/Privacy Act request to the IRS was sidestepped in 1978. The official documents are part of the Tax Court record and are included with that record. A transcript of a related earlier trial is included in that evidence.

V

Grounds Invoked

(1) Nature of proceeding and Court jurisdiction-- This case is brought under the Internal Revenue Code of 1954 (26 U.S.C.) and in particular, Sections 162 and 183 of that code. The jurisdiction of

the Federal Court system arises from Article XVI of the Constitution granting to Congress the right to tax income and from Article III Section 2 which grants jurisdiction to the federal courts in disputes arising from the tax laws enacted by the Congress.

(2) Entry of judgment-- The Appeals Court Judgment in this case was made by the Appeals Court for the Fourth Circuit on April 20, 1993 and a delayed Notice of Judgement was filed on April 28, 1993. A petition for rehearing with a suggestion for En Bank review was denied and filed by the Clerk of that Court on May, 25, 1993. A Notice of Appeal was filed by mail on June 1, 1993 in the Court of Appeals for the Fourth Circuit in Richmond, Virginia but was returned June 2, 1993 with notification that a petition for Certiorari must be filed directly with the

Supreme Court within 90 days of the entry of judgement. This document seeks to comply with those rules. The lower court Opinions and Orders are reproduced in Appendix A.

(3) Statutory provision-- The statutory provision believed to confer jurisdiction on the Supreme Court in this case is believed to be in Article III Section 2 of the Constitution of the United States as cited above.

VI

Constitutional Provisions

The primary Constitutional provision under which standing to bring the case before the Supreme Court resides in Article XVI of the Constitution which states:

'The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.'

Under this provision of the Constitution the case is brought concerning implementing legislation by the Congress, Specifically U.S.C. 26 sections 162 and 183 but including other legislation as applicable. Pertinent parts of Section 162 and 183 are supplied as an appendix to this document.

In addition, the questions raised in the previous section of this document are believed to confer standing both separately and collectively with regard to the constitutional issues cited in that section.

VII

Concise Statement of the Case

Mr. Robert Scott Dunning is a professional artist living and practicing his profession in Fort Lauderdale, Florida. At the time this case was originally brought he resided in Hampton, Virginia. He also maintained a sales office and studio in nearby Virginia Beach, Virginia. Mr. Dunning is employed in the painting of portraits in oil although he is active in other media and other types of subject matter as well. He is self employed in this activity and strives to produce art which is of a technical quality suitable for museums. That is, his oil paintings, under normal museum conditions are expected to last over 400 years. The prices that Mr. Dunning charges for his work are in keeping with their quality and the time

and effort required to produce them. They are high by normal sidewalk artist standards but not out of keeping with the norms of serious portraiture.

As a consequence of the specialized type of art in which he is engaged, Mr. Dunning sells his paintings infrequently. It should be noted, however, that even by the average standards for artists Mr. Dunning is not out of keeping with other practitioners in his profession. In the United States only about 2%, or approximately four hundred professional artists out of 20,000, are able to support themselves primarily from their art. At the time the case was brought, Mr. Dunning derived his main financial support by working as a research scientist for the National Aeronautics and Space Administration. In this respect he differed at the time from most professional artists

only in the discrepancy between the income that his secondary profession afforded him and the much lower income that he obtained from his primary profession. Notwithstanding this, Mr. Dunning, then and now, does consider that his profession as an artist is his primary profession; and to that end he strives to conduct it in a business-like manner with the intention of ultimately making a respectable living from it. At the time this case originally came before the courts he already devoted far more time to his artistic career than he did to his scientific career [1].

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[1] This circumstance was not altogether voluntary. The agency itself had long since ceased to be involved in serious scientific research. Petitioner had been employed by the agency for 31 years and had little difficulty performing the trivial duties assigned to him. He retired from government service on September 22, 1992, the first day that he could have done so under federal retirement statutes, to devote his time entirely to art.

In the instant case the IRS has ruled that Mr. Dunning's artistic activities are actually a hobby instead of a profession and has rejected other related deductions. This ruling was undertaken by the IRS after a casual audit of his tax returns but with no other investigation as to the true facts. In addition, the ruling was made in the face of essentially complete justification and documentation of the serious, professional nature of Mr. Dunning's business. Subsequently, Mr. Dunning also requested a higher level of review of his case within the IRS. The IRS denied this request in a terse, handwritten note signed by the original auditor. Subsequently the artist has contended in both the Tax Court and the Appeals Court that the IRS should justify any adverse ruling by both investigation of the facts pertinent to the case and by citing pertinent sections of applicable

law. This the IRS consistently failed to do. The IRS has simply asserted, without evidence, that Mr. Dunning is not in business to make a profit and shifted the burden of proof to Mr. Dunning if he wishes to prove otherwise. In the tax court Mr. Dunning was able to substantiate all of his claims to the apparent satisfaction of the court at the time. The IRS did not attempt to present a case to the court; but it did attempt to discredit the taxpayer by calling attention to a few trivial deductions that it considered to be particularly outlandish. However, these deductions, when explained, turned out to be completely legal and proper. Subsequently, the Tax Court and the Appeals Court ruled against the taxpayer. In both cases, however, the ruling was justified only by the most grotesque distortions of the original evidence imaginable.

The IRS rejected Mr. Dunning's legitimate and normal business expenses based solely on the incorrect assumption that Mr. Dunning is not really in business to make a profit. It did this starting from the very first day that he was in business without allowing any time for the business to become established or to demonstrate a potential for ultimately making a profit. In this IRS did not allow even the time usually allocated to ordinary businesses to demonstrate that they could be profitable. It did so even though art of the type that petitioner produces has an extremely long shelf life. In terms of prudent business practices there was absolutely no necessity for such haste. (In fact oil paintings should not even be varnished for six months after completion.) Although paintings were occasionally being sold, it was clearly in

the best long term interest of the business for the artist to proceed slowly in the area of sales and to concentrate on production until a reasonable inventory was available. The fact that Mr. Dunning expected to retire from his civil service position very shortly; and that after retirement he would have more time to devote to sales certainly made this the most sensible approach to developing his business.

Mr. Dunning contended that the desire to make a profit is only one of a number of criteria which are spelled out under Section 183 of the Internal Revenue Code; and that, although an important consideration, is in itself not the sole governing criteria for determination of the bonafide nature of a business. He further contended that the ruling of the IRS does not adequately take into account

Mr. Dunning's realistic plans for the development of his business in a fashion intended to maximize his profit. In essence, the IRS, by demanding instant profit to satisfy its unrealistic criteria for acceptance of a business activity as legitimate, has dictated the manner in which Mr. Dunning must run his business --a manner inconsistent with the inherent nature of the business. Mr. Dunning contended that he is in business to make as much profit from his artistic activities as possible in the long run and that it is his perrogative to determine the timing of his business moves and the types of business decisions which must be made to achieve that profit objective. Further, he contended that his artistic activities have been conducted in a businesslike manner differing only from any other professional, business activity in the false perception by the IRS that artistic

activity, which involves an element of pleasure, is somehow different and less of a business activity for that reason. Further, Mr. Dunning also contended that the IRS was in error on this point since his secondary activity, namely scientific research, was an equally pleasurable activity when properly pursued. However, the IRS claimed that scientific research was his sole occupation simply on the basis of the prejudiced perception of its own officials as the the relative pleasurability of the two enterprises and the discrepancy between his income from his established occupation of 31 years and the new business that he had just established. Mr. Dunning contended in court that it was an unjustifiable and outrageous presumption on the part of the IRS to base its criteria for the deductability of business expenses on its own subjective preferences as to the degree of pleasure attached to a

business.

A fundamental principle of justice in the United States is that federal agencies are required to perform the duties of their mandate in accord with the laws, rules, regulations and other requirements that the Congress establishes or which the courts lay down in their rulings; and that when an agency willfully declines to follow these requirements, the fruits of this willful disregard do not have the same standing in court as would these same results had the law been followed. This principle finds justification in Article II of the Constitution which requires the president to "...take Care that the laws be faithfully executed,..." U.S.C. 26 Section 183(c) prescribes what must be done to determine if a business is engaged in for profit or not. Under this section the IRS and the

Courts are required to give consideration to all of the pertinent factors in a case before arriving at a determination. Consideration of all pertinent factors is mandatory and it is an obvious corollory that this consideration must be fair. In addition this section also states that no single one of the nine factors is determinative. That is the IRS must not base its determination on one of the factors to the exclusion of the others. These requirements are separate from each other. That is:

1. All pertinent factors must be considered.

2. No one of the factors determines the outcome.

In issuing its Notice of Deficiency the IRS did not follow either of these directives. It based its issuance of the

Notice of Deficiency on one factor only --the absence of profit in two early years of the business. It did not consider the other factors; and it did not even gather the information necessary to form conclusions about several of the factors. The IRS confined its written submissions concerning the case to only two items: the tax returns themselves and a "Notice of Deficiency". None of these documents addressed compliance with the 183(c) requirements. Counsel for the IRS made no effort to establish that 183(c) had been followed. Finally, the factual errors in the answer brief filed to the Appeals Court for the Commissioner of the Revenue, written long after the Tax Court opinion was rendered, leaves no doubt whatsoever that the IRS was not and has never been in posession of the information needed to reach a conclusion with regard to 183(c). The IRS is, of course, under an affirm-

ative obligation to tell the entire truth fairly, completely, and accurately before any "presumption of correctness" can take effect. Here, however, the IRS simply never followed the procedures required by law under the tax code! It is not surprising, therefore, that almost nothing that the IRS has claimed has been factually correct in all major respects. It follows that the statement in the Notice of Deficiency regarding whether or not Mr. Dunning was in business to make a profit is nothing except unsupported allegation. The remaining items in dispute on the Notice of Deficiency all would have been permissible business expenditures if Mr. Dunning prevailed on Section 183.

Later, in its response brief to Mr. Dunning's appeal to the Fourth Circuit, the Justice department conceeded this point and attempted to justify the

absence of a valid determination by the IRS by claiming that whatever the IRS had done or not done was immaterial since the Tax Court made its own determination independent of the IRS. Such a claim is incorrect in law; and the appeals court made a clear error in law by accepting this argument. In addition, it is inconsistent with the position of other appeals courts. For instance, the Appeals Court for the District of Columbia Circuit, citing SEC v. Chenery Corp., 318 U.S. 80 (1943), has previously stressed that an "administrative agency must defend its decision in court on the same basis as it gave for the decision itself" Lanphear v. Prokop, 703 F.2d 1311, 1317, n. 39 (D.C. Cir.1983). This is so, because "[i]f an order is valid only as a determination of policy or judgement which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made

to do service for an administrative judgment" SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

According to this precedent a court is required to base its findings on the law and the evidence before the court. It cannot simply substitute its own judicial judgment for an administrative judgement required of the IRS when the IRS fails to follow the fundamental requirements of the law under which it brings the case --the instructions in law as to how the determination is to be made. It is axiomatic that the Tax Court in sitting cannot possibly conduct an exhaustive tax audit, especially as in this case the Tax Court, under threat of court sanctions, had placed a four hour limit on the court proceedings at the pretrial conference. In the instant case the only admissible evidence was the testimony of the taxpayer

and his witness. The Tax Court recognized this fact in its bench opinion. However, it totally ignored this same fact in the body of the opinion itself. The Court at its own discretion did not elect to leave the record open for clarification or enlargement. It must only be assumed that the Court was satisfied with the evidence that was presented by the taxpayer --however incomplete that evidence might have been because of the four hour time limit. That both the Tax Court and the Appeals Court subsequently published statements that were grotesquely distorted, out of context, and completely incorrect as to fact is a clear instance of error on the part of the courts. It is all the more disturbing, however, in that it is in direct conflict with a clear and accurate record placed before the Tax Court in the original record in the case, all of it placed there by the taxpayer.

The Decision of the Tax Court is flawed by a simple blunder. In its examination of Sec.(183) of the tax code the Tax Court based its findings on two of the nine factors that it considered to be against the taxpayer, the fact that taxpayer earned a substantial income from his NASA employment but received substantial tax deductions from the expenses of his art studio and its perception that taxpayer would never recover his expenses because of meager art sales. The tax Court overlooked the prospect of an eventual profit to the art business through appreciation of the assets used in the business, in this case the artist's new studio located in a resort area but also a good sales location and also located in the center of most of the professional art activity conducted in southeastern Virginia. The law explicitly

requires that such assets be considered in determining if an activity is a business or a hobby. Had the lower courts been willing to correct this blunder, only one of the nine factors would have been available to make an adverse determination. However, Section 183. also stipulates that no one factor is determinative. Thus the Tax Court was faced with a forced ruling in favor of the taxpayer if it had been willing to correct its own blunder. The failure of the Tax Court to do so, and the subsequent failure of the Appeals Court to reverse such a clear error is simply an outrageous exercise in arrogance on the part of the courts. In both courts the prejudices of the judges was so strong that neither the law or the facts of the case could shake it. In effect the courts agreed with the IRS in demanding a large sales volume and corresponding profit in the first few years of the existence of

the business and in demanding that such profits be generated solely from the direct sales of the artist's product [2], at depressed prices, without any regard for the future prospects of the business in the long run. It discounted the fact that the artist planned to retire from government service shortly to devote full time to his art business and totally ignored the fact that his studio was an appreciable asset. Clearly, such a standard would not have been applied to most

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[2] This statement is not correct in the strictest sense. Among the mindless catalogue of things suggested by the tax court that taxpayer should or should not have done to demonstrate a genuine intent to make a profit, the Tax Court noted in it's oral opinion that "Petitioner did not rent out the condominium." apparently meaning to imply that, had taxpayer utilized his art studio as rental property, he might have had a more convincing case that he actually intended to make a profit. The Tax Court stopped short of suggesting the next logical step, however, that taxpayer should also have rented out his brushes and easel.

other businesses; and just as clearly, it arose, not out of the facts or the law, but from the personal uninformed biases of the judges themselves that art is always just a hobby because it is pleasurable. Under such a biased viewpoint the court could rationalize the artist's studio as his "luxury condominium located in a resort" even though the resort was the city adjacent to his city of residence and the luxury condominium was a commercial condominium in an area zoned for commercial business and consisted of only five hundred square feet. Petitioner suggests that only extremely biased judges could reach such unrealistic conclusions.

If the Tax Court is allowed to reject the evidence presented by the taxpayer, then it is left with no evidence at all upon which to base a decision. It could not reasonably place any reliance

upon a presumption of correctness in favor of the IRS because the one fact in this case of which the Tax Court was absolutely certain was that the IRS was willing to lie to the courts in order to win the case. That fact was established at the beginning of the trial when the attorney for the IRS perjured himself by stating falsely to the court that he had supplied a letter containing a proposed set of "agreed to facts of the case" in a timely manner to the taxpayer. He had not done so; and he certainly knew better when he made the claim before the court. Taxpayer called him on the issue and proved absolutely that he was lying by producing the dated and signed letter. (This after the attorney had declined to produce it claiming that he had left his copy at his office.) The attorney apologized to the Tax Court on the spot!

The issue was an important one since that particular attorney had been admonished by the Tax Court in the earlier trial covering the first three years of taxpayer's art business. In that trial also, the IRS had been dishonest with the Tax Court. However, taxpayer had not been able to prove it at the time to the degree of absoluteness that would have been required by an extremely biased tax court. Such practices, according to the Federal Personnel Manual, are, of course, strictly illegal under 18 U.S.C 1001 which states in part

> "Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and willfully ....makes any false, fictitious or fraudulent statements or representations, ...shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The explicit quotation of this law in the Federal Personnel Manual suggests that federal officials have a special

obligation above and beyond that of the general population to be truthful in the conduct of their office. It applies not only to sworn testimony in a court but universally to all statements of federal officials in any capacity.

In addition, the issue of dishonesty goes well beyond the particular instance that was proven before the Tax Court at the beginning of the trial here appealed. That perjury was committed and unmasked in an open Tax Court session attended by a very large number, possibly even all, of the attorney's assigned to the Richmond office of the IRS. The man's supervisor was among those present. All the same, the IRS took no corrective action! Clearly, dishonesty before the courts, at least in the case of pro se litigants, is a practice that the IRS sanctions as an institutional policy. It

is not the isolated act of one dishonest attorney.

The Tax Court ruled against the taxpayer even though all of the evidence before the court was in his favor. Taxpayer subsequently appealed the case to the Court of Appeals for the Fourth Circuit. After the filing of briefs and a detailed reply by Mr. Dunning to each and every issue raised by the IRS, the Appeals Court rendered a two page, unpublished affirmation of the Tax Court Decision; based, however, on a distorted perception of the facts that could easily have been avoided had the Appeals Court exercised due diligence and examined the original record as taxpayer had urged in his brief. The Appeals Court decision supported a "presumption of correctness" to the IRS Statutory Notice of Deficiency. Clearly, the Appeals Court did not give the case

the careful consideration normally expected of a higher court. Consequently, Mr. Dunning filed a Petition for Rehearing with a suggestion for an En Bank review with the Appeals Court which that court subsequently rejected. The current appeal now brings the case to the Supreme Court.

Both the Tax Court and the Appeals Court ignored the issue of IRS dishonesty which is one of the issues central to the case. The main issue before the Appeals Court was: Which side is to bear the burden of proof? Petitioner claimed that once it had been proven absolutely that the IRS was willing to lie to the Tax Court, "presumption of correctness" notwithstanding, the burden of proof must shift to the IRS. Since the IRS had not bothered to present a case and, in fact, had never even collected the information necessary to present a case, such a shift

of burden would have forced a decision in favor of the taxpayer without a need to adjudicate the detailed particulars. Petitioner now reiterates this position before the Supreme Court. Further he also submits that the Circuit Court's judgment, obviously failing to deal with what is probably the most important issue at that level of adjudication brought on appeal, despite a clear and discrete appeal as to this issue, has abandoned even a semblance of justice. In leaving only part of the case reviewed and decided, yet affirming the whole matter and in dealing with such important issues as are involved here by an abbreviated "Not to be Published" order, the appeals court has "so far departed from the accepted and usual course of judicial proceeding...as to call for an exercise of this Court's power of supervision." (Rule 17 of the Supreme Court Rules). It should be noted that the

Tax Court had originally taken upon itself the responsibility for dealing with the perjury; but upon taxpayer's proof that the IRS actually had perjured, the Tax Court did nothing. Consequently, taxpayer stands before this court complaining of conduct so egregious as to preclude any possibility of a fair trial in the lower courts.

Taxpayer respectfully suggests that these compelling grounds, discussed in depth, are more than sufficient for granting a writ of certiorari as to the questions presented as set out above.

IX

Importance of the Case

This case is of considerable importance to the United States for a number of social as well as legal reasons.

The implications for art and artists boil down to a simple demand for justice under the law. Historically, the IRS has a record of discrimination against artists which cries out for rectification by the courts. Succinctly, the IRS approaches its dealings with artists from a bias which assumes that art is practiced in the United States simply as a tax dodge and that, therefore, all artists who do not make money immediately out of their art are tax cheats. This fundamental attitude precludes fair administration of the tax laws where artists are concerned. Artists, in turn, are forced to cut corners with the quality of their art in an effort to produce work fast enough and saleable enough to satisfy the IRS. Is it any surprise then that the great potential of the United States in art goes unrealized?

Legally the major question before the Court is of equal importance. That question revolves around the traditional belief in the United States that every legal entity be it a person, an institution, or a government agency, should stand before a court as equals in law. In this case, a double standard favoring a government agency stands nakedly exposed. The lower courts have simply asserted that the IRS need not bother to adhere to the tax code in the process of enforceing that code while the taxpayer must not only adhere to it; but must do so to the level of an impossible standard of proof. It should be remembered that all of the evidence in this case favored the taxpayer. The IRS never bothered to even make a case before the Court. Certainly, in a country where the tax collection process is based on the honor system and respect for the integrity of the

collection agency is essential for it's success, such a situation is intolerable.

In the case presented here the issue of Executive versus Judicial responsibility is also of sufficient importance to justify plenary consideration by the Supreme Court. Since the IRS clearly did not carry out its mandate in performing a careful tax audit, the Tax Court effectively performed the audit for the IRS. It did this even though it is simply not structured to perform this function. As a consequence, it failed miserably at getting its facts straight. In the past, the lower courts, specifically the Court of Appeals for the D.C. Circuit, have held that it is not their duty to perform a mandated Executive Agency function when the Executive Agency fails to perform that function. On the other hand, the Appeals Court for the 4'th

Circuit, here repudiates that concept.

That the facts before the Supreme Court in this case, as represented by the IRS and the lower courts, do not even remotely approach the ideal of "the whole truth and nothing but the truth" should not serve as a deterrant to taking this case. In the first place, the Constitution grants final authority for determination of fact as well as law to the Supreme Court. Second, an accurate and reliable factual basis does exist in the original transcript which is fully supported by a related original transcript in an earlier trial. Third, it is the grotesque distortions of fact in this case which the lower courts used as a justification for the legal errors which made an appeal to the higher courts necessary at all. The higher court has a responsibility to hold the lower courts, at a

minimum, to an attempt at accuracy with regard to the readily available facts of the cases that they decide. Finally, the legal issues are so broad and so clear, that even massive distortions of the facts cannot overcome the fundamental injustice in law that the lower courts have sanctioned.

In the addition to the above, this case presents the Supreme Court with a proposition that it can't afford to refuse. Honesty in court testimony lies at the very heart of constitutional government. If the Supreme Court is unwilling to to take a public stand in a case as egregious as the one that is presented here, then it must, in the long run, loose the respect of the public for the integrity of the court system itself. Ultimately, of course, the courts derive their power from the respectful deference

of the public in general. The Constitution does not confer direct power on the courts. Thus, in a case dealing directly with that integrity, the Supreme Court does not have the freedom to pick and choose in granting certiorari that it might have under other circumstances. If it fails to take a stand, then the Court is reduced to a rubber stamp for the executive. The entire system of checks and balances purposefully incorporated into the constitution collapses and the Constitution becomes nothing more than a piece of paper expressing the wishful thinking of the founding fathers. This petitioner respectfully suggests that that should not be allowed to happen.

Respectfully Submitted,

Robert Scott Dunning